

Removing Emotional Harm from the Core of Tort Law

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My commentary is directed to one important feature of the new *Restatement (Third) of Torts: General Principles* (Discussion Draft) ("Discussion Draft")¹—the decision to remove liability for emotional harm from the core of tort law. As a Torts professor, I am very attracted to the Discussion Draft because to a large extent it tracks the way I structure and teach torts to first year students. It reflects what Professors Jack Balkin and Sanford Levinson describe as the pedagogical canon in torts,² by highlighting those topics and subtopics that most professors emphasize in their scaled-down Torts course and including the material that most agree every beginning law student should know.

I am not so sure that the Discussion Draft responds as well to the needs of practitioners and judges who have already passed the course in Torts. For me, one test of a *Restatement* is whether it will help lawyers and judges argue and decide the non-routine case, where precedent is scarce and the stakes seem high. An irony of the *Restatement* process is that a *Restatement* is needed to provide some guidance for legal actors in cases where the boundaries and catego-

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1. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES (Discussion Draft Apr. 5, 1999) [hereinafter Discussion Draft]. This commentary focuses solely on the Discussion Draft prepared by Gary Schwartz and the critique of that draft contained in John C. P. Goldberg & Benjamin C. Zipursky, *The Third Restatement and the Place of Duty*, 54 VAND. L. REV. 657 (2001). I have not attempted to comment on the alternative draft prepared by Harvey Perlman. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES (Preliminary Draft No. 2, May 10, 2000) [hereinafter Preliminary Draft No. 2].

2. See LEGAL CANONS 7 (J. M. Balkin & Sanford Levinson eds., 2000).

ries are contested and everyone agrees that simply stating or restating what purports to be the prevailing legal doctrine is not enough. Thus, it is critically important that the framework of a *Restatement* to alert practitioners and judges to the areas of confusion and contest and pay attention to those lively and dynamic areas of the law where there are no clear trends. For this reason, I have always thought that the best parts of the *Restatement* were the Caveats.³

For many years, I have had a fascination with tort claims for emotional distress and relational injury, as opposed to claims for physical harms to persons or damage to property.⁴ I have studied emotional distress cases principally because I regard these cases as particularly important for women: whether it is a pregnant woman seeking to recover for a miscarriage caused by fright in the 19th century,⁵ or a mother in the late 1960s suing for the shock of witnessing her child killed by a negligent driver,⁶ or a female patient suing her doctor for wrongful birth in the 1980s.⁷ In the hierarchy of torts, emotional and relational harms are not as fully protected as physical injury and property damage. This is a feature of modern tort law that I have argued disproportionately harms women and has meant that law does not recognize many of the important, recurring injuries in the lives of women.⁸

As much as I rail against it, however, I have come to expect the marginalization of emotional harm in discussions of tort law.

3. The caveat and commentary following Section 46 made it clear that the law on intentional infliction of emotional distress was in a stage of development and the Institute cautiously expressed no opinion as to whether there might be circumstances beyond the scope of Section 46 that might subject an actor to liability. RESTATEMENT (SECOND) OF TORTS § 46 caveat & cmt. c (1965).

4. See Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Martha Chamallas, with Linda K. Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

5. See, e.g., *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896); *Victorian Rys. Comm'rs v. Coultas*, 13 App. Cas. 222 (P.C. 1888); see also Chamallas, with Kerber, *supra* note 4, at 826-28 (discussing *Mitchell*).

6. See *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); see also Chamallas, with Kerber, *supra* note 4, at 855-58 (discussing *Dillon*).

7. See, e.g., *Lininger v. Eisenbaum*, 764 P.2d 1202, 1208 n.9 (Colo. 1988) (listing cases recognizing wrongful birth cause of action, decided mostly in the 1980s). I mention wrongful birth claims in my discussion of negligent infliction of mental distress because the parents' emotional distress in such cases is often a significant element of damages. The gravamen of wrongful birth cases, however, is the denial of plaintiff's reproductive autonomy and choice and the claim is best viewed as a species of informed consent. However, some courts have erroneously categorized wrongful birth cases as "bystander" cases, even though the mother in such cases is typically a patient of the defendant. See DAN B. DOBBS, *THE LAW OF TORTS* § 292 (2000).

8. See Chamallas, *supra* note 4, at 489-503.

But the Discussion Draft goes further than relegating emotional harm to the margins. It excludes it altogether, at least in those portions of the *Restatement* relating to basic principles.⁹ The Introductory Note discloses that claims for emotional harm are left out of the *Restatement* project that covers only "personal injury and property damage."

The purpose of this *Restatement* project is to work through the "general" or "basic" elements of the tort action for liability for accidental personal injury and property damage. (The problem of accidental injury is what many see as the core problem facing modern tort law.) Given the project's "general" interests, the project does not cover such special topics as professional liability and landowner liability; and given its focus on the core of tort law, it does not itself consider liability for emotional distress or economic loss.¹⁰

The excision of mental distress cases from the *Restatement* is accomplished by two interrelated cuts. First, cases of intentional infliction of mental distress are excluded because "accidental injury," rather than intentional torts, is declared to be "the core problem facing modern law." Second, and most important for purposes of this Commentary, is the exclusion of cases of negligent infliction of mental distress.¹¹ Even though such cases obviously concern accidental injuries, they are likewise excluded, for the same reason that they are not classified as within "the core of tort law."

This Commentary will first explore what it means to say that emotional distress is not part of the core of tort law and as such is a topic that does not warrant even specific sections in a text devoted to the general principles of negligence law. I will then speculate on what is lost by removing emotional harm from the basic text and why I disagree with that choice. Finally, I will comment on the alternative presented by John Goldberg and Benjamin Zipursky in their article addressing duty in the Third *Restatement*.¹² In contrast to the Discussion Draft, Goldberg and Zipursky treat emotional harm in two specific provisions under the heading of limited

9. The commentary to Section 3 indicates that "[t]he extent of liability in negligence for economic loss and emotional distress is dealt with elsewhere in the *Restatement of Torts*." Discussion Draft, *supra* note 1, § 3 cmt. a. It is not clear, however, whether the cross-reference refers to the provisions of the *Second Restatement* treating these topics or to a future *Restatement* devoted to economic loss and emotional distress.

10. *Id.* at xxi.

11. The Discussion Draft also excludes cases of pure economic loss. See *id.* § 3. Although some of the same objections to excluding emotional harm could also apply to the exclusion of economic loss, this Commentary deals only with the *Restatement's* approach to emotional harm. The exclusion of economic loss from the "core of tort law" also raises issues with respect to the intersection of contract and tort law that are not as prominent in emotional distress cases.

12. See Goldberg & Zipursky, *supra* note 1.

duty.¹³ By retaining duty as an element of the plaintiff's prima facie case and highlighting areas of limited duty, their analysis has the virtue of calling some attention to emotional distress cases. However, in my view, neither their specific sections on emotional distress, nor their duty-focused, relational approach to negligence law yet provides an adequate treatment of recovery for emotional harm.

Because the decision to exclude emotional harm from the new *Restatement of General Principles* hinges on an assessment of what is in the "core" of tort law, any challenge to that decision preliminarily requires a definition of terms. Just what does it mean to be at the core? The dictionary definition of the word is quite revealing here. It defines "core" as "the hard or fibrous central part of certain fruits, such as the apple and the pear, containing the seeds. The innermost or most important part of something; heart; center."¹⁴ The dictionary concept of "core" indicates that what is in the core critically affects the rest of the entity, whether it is a fruit with seeds or a conceptual category. It also embodies a judgment of value, such that whatever is in (or gets placed in) the core is presumably more important or essential to the entire category than what is outside the core.

As used in the Introductory Note, "the core of tort law" thus signals that its contents are more important to tort law generally, without disclosing the standard by which we should gauge importance. Absent further specification, the most that could be said is that the "core of tort law" could conceivably have both a quantitative and a qualitative dimension. Specifically, physical harm cases may be said to be at the core of tort law because of their *prevalence* or their *centrality*.

Although, like Goldberg and Zipursky, I am most interested in the qualitative claim that physical harms are more central to tort law, one point related to the quantitative claim deserves mention. Clearly, cases of physical harm predominate simply as a numerical matter. I have little doubt that there are more claims filed for negligent infliction of physical harm than for emotional distress, although I wonder about the ratio of emotional harm to property damage cases. The relative number of cases filed, however, does not necessarily mean that, in the real world, physical injuries are more prevalent than emotional harms or even that there are more legally cognizable cases of physical injuries "out there" than emotional

13. See *id.* app. § D2(b)(1), (2).

14. THE AMERICAN HERITAGE DICTIONARY 324 (2d ed. 1982).

harms. Instead, I suspect that there is a mutually reinforcing relationship between the responsiveness of the legal system to certain types of injuries, on the one hand, and the number of such suits filed, on the other.

Despite the perception that Americans are quick to resort to the courts, there is a considerable gulf between possessing a formal right of action and transforming that right into a lawsuit. People cannot be expected to sue in large numbers unless there is social support for their claims, their injuries are generally recognized as real injuries, and there are no formidable structural barriers to asserting their claims. For example, in a recent manuscript,¹⁵ Professor Jennifer Wriggins challenges the conventional wisdom that compensation for accidental injury is the most critical problem facing tort law. She argues that given the current high rates of domestic violence, sexual assault, and rape in our society, it is questionable to view the compensation scheme for intentional injury as incidental or as a thing of the past. Her argument has force if we imagine that each incident of domestic violence or sexual assault could form the basis of a tort claim. In such a world, we would surely have to reassess whether accidental injury was the most prevalent type of harm.

My larger point is that the number of lawsuits not only affects what is considered to be the "core" of tort law, but what is regarded as "core" affects the number of suits filed. Given this interrelationship, we should hesitate to determine what is the core of tort law solely by reference to a quantitative standard that equates importance with prevalence. I also agree with Marshall Shapo's practical observation that, given the overwhelming number of torts cases, and the difficulties of calculating the numbers of each type of case, the Reporters are probably wise not to rely principally on an "abacus" or case counting approach to the Restatement process.¹⁶

The more interesting question is why is emotional harm not treated as being *central* to tort law? What is it about the liability rules for physical harm and property damage that justifies calling them "general principles" and labeling the rules in emotional harm cases "special applications"? What is implicit in these framing decisions?

15. Jennifer Wriggins, *U.S. v. Morrison* and the Costs of Violence Against Women: Torts, Insurance, and Ideas for Compensation 33-34 (2000) (unpublished manuscript, on file with author).

16. See Marshall S. Shapo, *On First Looking Into General Principles of Torts: Ruminations on Restating for an Ex-Dean*, 78 NEB. L. REV. 891, 894 (1999).

As I see it, three types of arguments could be made to justify the exclusion of emotional harm. Each of these arguments implicitly conveys a message about the relative importance of claims for emotional distress, none of which I think is an accurate or desirable restatement of contemporary law. Below, I list the arguments in their barest form, before discussing them in more depth.

1. The Hierarchy Argument

The first argument is an implicit argument based on a hierarchy of the types of harm. It claims that freedom from emotional distress is invariably an interest of lesser importance that does not deserve top billing with physical harm and property damage.

2. The Trend Argument

The second implicit argument or message relates to trends or directions in the law. The argument is that, similar to most relational harms, such as claims for loss of consortium, claims for emotional distress are being phased out, or at least there is no trend towards enlarging these pockets of legal liability.

3. The Analytical Coherence Argument

The third argument centers on analytical coherence and claims that separating emotional harm from the general principles of negligence law is justifiable because the general principles do not really explain the results in the emotional harm cases. Under this view, an analysis of emotional harm cases will do little to enlarge our understanding of general principles of tort law, such as reasonableness or proximate cause.

Let me dispatch the hierarchy argument briefly and concentrate on the trend and the analytical coherence arguments. At the outset, I would question whether either current law or injured parties invariably regard emotional harm—regardless of its severity and regardless of the context of the case—as being of a lesser order than physical harm or property damage. Rather than reflecting a strict, categorical approach to liability, the cases suggest that it is the *degree* of harm, rather than the *nature* of the harm, that is often of paramount importance in determining the scope of liability. Thus, in cases of intentional infliction of mental distress, most courts allow recovery without proof of physical harm or physical

manifestations, provided that plaintiffs can prove that their distress was severe.¹⁷ Although the trend is less pronounced in cases of negligent infliction of severe mental distress, many courts now permit a claim for severe mental distress unaccompanied by physical manifestations.¹⁸

It is true that, in some difficult contexts, courts may limit recovery in emotional distress claims to situations in which there could have been physical harm to the plaintiff. Thus, courts sometimes ask whether the plaintiff was in the physical danger zone and could have been physically harmed were it not for his or her good fortune. Using this standard, if the plaintiff was never in danger of being physically harmed, some courts deny recovery for mental distress. For example, plaintiffs have tended to lose negligent misdiagnosis cases in which the physician erroneously tells a healthy patient that she has a serious disease.¹⁹ Because a misdiagnosis of this sort, however negligent, does not threaten physical harm to the patient, courts reason that the danger zone requirement is not satisfied and that plaintiff's mental distress is not actionable. The urge to limit liability in such cases, however, should not be read as support for a rigid hierarchy based on the nature of the harm. Instead, the rationale for limiting liability to cases in which there is potential physical harm most probably is found in administrative concerns, i.e., in the desire to find a bright line rule to limit the number of claims. In this context, the danger zone requirement sets a rather arbitrary limit on the number of plaintiffs who may recover, without suggesting that emotional injuries suffered by persons outside the danger zone are by their nature different from injuries suffered by persons within the danger zone.

Equally unpersuasive is the trend argument that asserts that emotional distress cases are on the decline. It is surely not the case that claims for emotional harm are being phased out or have ossified into narrow pockets of recovery. We are well past the days when recovery for negligent infliction of mental distress was limited to cases involving the mishandling of corpses and death telegram cases.²⁰ Instead, the law is developing rapidly and no solid trends

17. See DOBBS, *supra* note 7, § 306, at 832.

18. See *id.* § 308, at 835-36.

19. See, e.g., *R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360 (Fla. 1995); *Heiner v. Moretuzzo*, 652 N.E.2d 664 (Ohio 1995). However, other courts have permitted recovery, even when the defendant's conduct posed no possibility of physical harm. See, e.g., *Chizmar v. Mackie*, 896 P.2d 196 (Alaska 1995); *Bramer v. Dotson*, 437 S.E.2d 773 (W. Va. 1993).

20. See JOHN L. DIAMOND ET AL., *UNDERSTANDING TORTS LAW* 165 (2000); DOBBS, *supra* note 7, § 303, at 825.

have yet emerged. I recently reviewed the mental distress case law in one jurisdiction—the state of Louisiana—and discovered a wide array of claims that defied precise categorization. There were the now-familiar “bystander” claims for shock at witnessing family members killed or injured. Interestingly, there were also suits by motorists who had run over pedestrians and claimed that the negligence of defendants had placed them in the position of harming third parties and causing them to suffer distress (and shock) from their “participation” in the accident.²¹ The fastest growing area for liability in that state involved fear of AIDS cases²² and cases involving fear of cancer from exposure to asbestos.²³ Because the fear of contracting an incurable or serious disease often provides the guarantee of genuineness of harm that many modern courts look for, plaintiffs had some success in such “fear of” cases.²⁴

Overall, in this lively area of the law, the categories are fluid. My personal favorite was a group of cases allowing recovery for mental distress suffered in an “ordeal in progress”—such as a train derailment or explosion—where plaintiff’s injury is close in time and distance to the event, even though plaintiff was not in the physical danger zone.²⁵

My point here is not to suggest that there is or should be recovery in each of these new types of cases. However, I do contend that this is a dynamic area of the law where we are likely to see more development and new trends emerging. Recovery for negligent infliction of mental distress should not be written off as inconsequential when courts will increasingly be called upon to articulate new boundaries of liability.

Once the arguments premised on a hierarchy of types of harm and on judicial trends are rejected as insufficient to justify excluding emotional harm from the core of tort law, we are left with the largely theoretical questions underlying the argument based on analytical coherence. In essence, the claim is that it makes sense to separate physical harm as a category from emotional harm and to construct different legal regimes for each type of harm. For the

21. See *Clomon v. Monroe City Sch. Bd.*, 572 So. 2d 571 (La. 1990); *Guillory v. Arceneaux*, 580 So. 2d 990 (La. Ct. App. 1991).

22. See, e.g., *Vallery v. S. Baptist Hosp.*, 630 So. 2d 861 (La. Ct. App. 1993).

23. See, e.g., *Lilley v. Bd. of Supervisors*, 98-1277 (La. App. 3 Cir. 3/24/99), 735 So. 2d 696.

24. See, e.g., *Vallier v. La. Health Sys., Inc.*, 98-834, p.6 (La. App. 3 Cir. 12/9/98), 722 So.2d 418; see also *Faya v. Almaraz*, 620 A.2d 327 (Md. 1993); *S. Cent. Reg'l Med. Ctr. v. Pickering*, 749 So.2d 95 (Miss. 1999); *Hartwig v. Or. Trail Eye Clinic*, 580 N.W.2d 86 (Neb. 1998); *Williamson v. Waldman*, 696 A.2d 14 (N.J. 1997).

25. See *McDonald v. Ill. Cent. Gulf R.R. Co.*, 546 So. 2d 1287 (La. Ct. App. 1989).

purposes of drafting a *Restatement*, this analytical move is convenient because it simultaneously restricts the domain of cases subject to the general principles stated in the *Restatement* and labels the rules in emotional distress as special and particular. By doing so, it puts less pressure on the *Restatement of General Principles* to explain a difficult class of cases and suggests that the rulings in emotional distress cases are not likely to have significance beyond their narrow category.

There are three reasons, however, why the argument based on analytical coherence is unpersuasive and does not support the sharp separation of physical and emotional harms that the *Restatement* tries to erect. First, in law as in other disciplines, there is a growing recognition both of the importance of emotion and of the inseparability of emotion from reason.²⁶ From Antonio Damasio's pathbreaking book, *Descartes' Error*,²⁷ to Martha Nussbaum's writing on emotions in criminal law,²⁸ scholars have moved away from explanations that place "the mental" and "the physical" in separate analytical categories. Instead, researchers are trying to develop new models of mind/body interactions that stress their interdependence. We are growing to understand that affect and emotion influence people's ability to make decisions and to appreciate the consequences of their actions. The new take-home message is that there is no sharp separation between cognitive processes and emotional states.

Not surprisingly, attempts to separate physical from mental harms in the law have not worked well. In fact there is still some question as to what should count as an emotional harm case.²⁹ Earlier courts treated all harms stemming from fright, even clearly

26. See, e.g., Symposium on Law, *Psychology and the Emotions*, 74 CHI.-KENT L. REV. 1423 (2000).

27. ANTONIO R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994).

28. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

29. The Discussion Draft is not entirely clear on this point. The basic provision on negligence liability covers "negligent conduct that is a legal cause of physical harm." Discussion Draft, *supra* note 1, § 3. The commentary to Section 3 defines "[p]hysical harm" to consist of "personal injury and property damage." *Id.* § 3 cmt. a. This language suggests that the exclusion applies only to cases of "pure" emotional harm in which the plaintiff suffers no accompanying physical injury or physical consequences. Goldberg and Zipursky apparently read Section 3 in this fashion. See Goldberg & Zipursky, *supra* note 1, at 665, 674-75, 692. However, the commentary to Section 3 notes only that physical harm "does not include economic losses or emotional distress that are not the consequences of physical harm," without discussing the proper characterization of cases involving physical harm produced by fright or other strong emotions. Discussion Draft, *supra* note 1, § 3 cmt. a.

physical events like heart attacks and stillbirths, as cases of emotional harm.³⁰ Newer cases more often focus on the effects of defendant's conduct, rather than on the mechanism of the harm.³¹ Overall, the line between the physical and the mental has increasingly blurred, as evidenced by a twenty-first century illness such as chronic fatigue syndrome. I doubt seriously if this is a propitious time to reaffirm the mind/body duality in a new *Restatement*.

Second, pushing emotional harm out of the core of tort law signals that general principles of negligence law will not control the outcome in negligent infliction of mental distress cases, suggesting that these cases are governed invariably by a specialized set of rules. However, there is no such clarity in the decisions of the courts. It is still very much a live issue as to whether, and in what contexts, emotional distress cases should be treated like "ordinary" negligence cases. Particularly in so-called direct victim or independent duty cases,³² in which the plaintiff can cast herself as something other than a witness to another's harm, several courts have held that general negligence principles apply without further refinement or limitation.³³ It is unfair to suggest that the debate is over.

Third, exclusion of mental distress from the core of tort law implies that close analysis of mental distress cases will not tell us anything important about the structure and basic features of negligence claims more generally. It obscures an important dynamic of a socially constructed system like law, namely, that what is located at the margins affects how we view and describe what is in the core or center. I believe this is one of Goldberg and Zipursky's major points. They contend that the Discussion Draft is able to understate the significance of the duty element in tort law only because it excludes a wide variety of cases, including the emotional harm cases.³⁴

One of the many reasons I like to have my students study negligent infliction of mental distress cases is that they often pro-

30. See *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896); *Victorian Rys. Comm'rs v. Coultas*, 13 App. Cas. 222 (P.C. 1888).

31. In "near miss" cases, for example, courts allow plaintiffs who fear for their own safety to recover for the physical effects of fright. See, e.g., *Falzone v. Busch*, 214 A.2d 12, 17 (N.J. 1965) (allowing pedestrian almost struck by automobile to recover damages).

32. The leading case is *Burgess v. Superior Court*, 831 P.2d 1197 (Cal. 1992). For a discussion of the independent duty cases, see DOBBS, *supra* note 7, § 312, at 848-51.

33. Recently, two courts have clearly expressed a desire to eliminate all special restrictions in negligent infliction of mental distress cases. See *Sacco v. High Country Indep. Press*, 896 P.2d 411, 418-26 (Mont. 1996); *Camper v. Minor*, 915 S.W.2d 437, 443-46 (Tenn. 1996).

34. Goldberg & Zipursky, *supra* note 1, at 669-73.

vide vivid examples of a more general feature of negligence cases, namely, the seamless web quality of the elements of duty, breach, proximate cause, and damages. Take, for example, the bystander case involving a plaintiff who is not related to the primary accident victim. When a person (outside the physical danger zone) suffers shock at witnessing an injury to a direct victim, the court may choose to deny recovery on any of four grounds tied to the four elements of the negligence claim. Thus, the claim might fail on the basis of no duty to a bystander; that the injury was unforeseeable and thus there was no breach of duty; that proximate cause was lacking because the injury was too remote or indirect; or that the type of damage, i.e., emotional harm, was not a legally cognizable type of harm. I do not think there is one right way to analyze such a case, even though we are more inclined these days to speak in terms of no duty or no cognizable type of harm. Instead, in this and in many other kinds of negligence cases, the elements are interrelated: What is regarded as reasonably foreseeable or unforeseeable or direct or indirect is affected by the nature of the harm and vice versa. Taking emotional harm out of the core of negligence tends to obscure the complex interrelationship among the elements and may send the misleading impression that the domain of each element is fixed, rather than contested and a matter of argument and judgment.

In the final analysis, I do not believe that liability for emotional distress can be set aside quite so easily simply by characterizing it as outside the core of tort law. The exclusion weakens the Discussion Draft in two respects. It fails to give serious treatment to an important and emerging area of law and it narrows the applicability of the *General Principles*, perhaps to such an extent that we might begin to question their general applicability.

In contrast to the Discussion Draft, the Goldberg and Zipursky article recognizes the value of including negligent infliction of emotional harm within the new *Restatement*, primarily to illustrate the need for separate treatment of limited duty cases. Their conventional structuring of the four elements of the negligence action places "emotional distress" along with "failure to rescue" and "economic harm" cases as recurring instances in which the courts are more reluctant to find a duty to act reasonably.

Goldberg and Zipursky's impressive attempt to offer their own version of a *Restatement of General Principles*, however, is not comprehensive and likely was not intended to be so. Their two terse

sections devoted to emotional distress³⁵ do not capture the diversity and complexities of the case law and suggest limitations on recovery that are not generally recognized in the cases. For example, under their proposal, recovery in "fear for oneself" cases is limited to plaintiffs who experience "fear of imminent, harmful physical contact." There is no hint that many courts have allowed recovery for "fear of AIDS" and "fear of cancer" where there has been actual exposure to the HIV virus or cancer causing agent,³⁶ even though contracting the disease was not imminent or even probable. Similarly, their proposal does not attempt to tackle the difficult task of adequately describing the boundary between so-called direct and indirect victim cases. It simply bypasses that issue by indicating that bystander recovery will be treated in a separate section.³⁷ Finally, their proposal introduces a new rule (not explicitly found in the case law) that imposes liability in cases where the defendant handles an "extremely sensitive matter" on behalf of the plaintiff where it could be expected that, if the matter were mishandled, it "would likely cause serious emotional distress in a person of ordinary sensibilities."³⁸ The commentary accompanying this provision explains that it is an attempt to offer "a generic description of cases involving false death telegrams, mishandling of corpses and other instances in which an actor undertakes to exercise care in handling a sensitive matter."³⁹ This generic expansion of the traditional exceptions to denying recovery, while creative, runs counter to Goldberg and Zipursky's stated desire strictly to restate the doctrine estab-

35. Goldberg and Zipursky offer the following two subsections under the primary heading of Limited Duties of Care:

(b) Duties to Avoid Causing Serious Emotional Distress.

(1) An actor is under a general duty to exercise reasonable care to avoid causing another to experience serious emotional distress through fear of imminent, harmful physical contact;

(2) An actor is under a limited duty to exercise reasonable care to avoid causing serious emotional distress to another if:

(A) the actor undertook on behalf of the other to exercise care in handling an extremely sensitive matter that, if mishandled, would likely cause serious emotional distress in a person of ordinary sensibilities.

Goldberg & Zipursky, *supra* note 1, app. § D2.

36. In such cases, most states require plaintiffs to prove that they have been "actually exposed" to the HIV virus through a medically sound channel of transmission that could have caused AIDS. See DOBBS, *supra* note 7, § 311, at 845. A minority of courts have allowed recovery for reasonable fear of AIDS, even when the plaintiff cannot prove that she has been actually exposed to the virus, such as in cases of accidental needle pricks where it is not known whether the needle is contaminated. See *id.* § 311, at 846 & n.13.

37. See Goldberg & Zipursky, *supra* note 1, app. § D2 cmt. e.

38. *Id.* app. § D2(b)(2)(A).

39. *Id.* app. § D2 cmt. g.

lished in the cases and to refrain from imposing order onto a body of law that is far less organized.

By including emotional distress cases within the body of tort law subject to general negligence principles, the Goldberg and Zipursky draft introduces at least some of the issues that surface in emotional distress cases and responds to my arguments related to analytical coherence. Their attempt, however, to confine emotional distress cases within two narrow boxes may send some of the same dismissive messages as the Discussion Draft. In particular, their treatment of emotional distress suggests that emotional harm is by its nature of lesser importance than physical harm or property damage and that there is little chance of the law changing in a direction that recognizes new types of claims or significantly enlarges areas of recovery.

I recognize, of course, that the appendix to the Goldberg and Zipursky article is offered not primarily for its specifics, but for its alternative framework, one in which "duty" figures more prominently and in which "policy-based exemptions from liability"⁴⁰ are treated as qualitatively different from other no-duty or limited duty restrictions. In closing, I wish briefly to explain why I am not yet ready to sign onto Goldberg and Zipursky's relational theory of negligence, despite the eloquent and forceful presentation of their theory in this and prior articles.⁴¹

My main reservation is that Goldberg and Zipursky's relational theory of negligence does not help much to analyze recurring cases, like the fear of AIDS cases, in which plaintiffs fear for their own safety but there is no imminent danger of physical harm. Posit, for example, the case in which a patient in a hospital is pricked by a syringe or needle that was improperly disposed of or improperly sterilized, and there is no way to tell whether the needle was contaminated by HIV positive blood.⁴² The plaintiff sues after he is advised by his doctor to undergo testing for AIDS and develops a fear of contracting the disease. Most courts would deny recovery in such a case, unless plaintiff could prove that the needle was in fact contaminated by HIV positive blood. If recovery is to be denied even though the patient's fear is arguably reasonable (at least for the "window of anxiety" until the tests prove to be negative), is it be-

40. *Id.* app. § E.

41. See John C. P. Goldberg & Benjamin Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998); Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998).

42. See e.g., *Stewart v. St. Francis Cabrini Hosp.*, 96-1167 (La. App. 3 Cir. 6/11/97), 698 So. 2d 1; *Walker v. Allen Parish Health Unit*, 97-1007 (La. App. 3 Cir. 4/1/98), 711 So. 2d 734.

cause there is no duty to the patient? Or because there is no duty to protect against this particular risk? Is this a policy-based exemption to liability or simply an application of a limited duty rule? In my view, there is a clear duty to protect the plaintiff in such a case simply because he is a patient. If there is to be no recovery for fear of AIDS, even during the window of anxiety, it is best explained by policy concerns about ruinous liability, concerns for perpetuating myths about the spread of AIDS and a desire to reserve funds for the truly unlucky victims who actually contract the disease. I must confess, however, I cannot tell from the Goldberg and Zipursky article how they would analyze such a case. I am not sure whether the outcome in such a case turns on lack of "duty in the primary sense" under Goldberg and Zipursky's scheme.

On the other hand, in the classic bystander suit,⁴³ a relational theory of negligence seems more useful. I believe that one reason why courts have permitted recovery for close relatives who suffer shock at witnessing injury and death of loved ones, and have tended to deny recovery to all other witnesses, is that they place a higher value on family relationships. I agree with Goldberg and Zipursky that it is not useful to focus the debate over liability in bystander cases on macro-level policy questions. They are wise when they assert that courts would do better to ask whether there is a duty or a sense of obligation to protect a family member from the special harm that stems from seeing the accident itself. In my view, however, this is not because the analytical structure of all torts claims is relational. Rather, of the four elements in the negligence claim, duty here simply provides a convenient vehicle to investigate the quality and significance of the real-life relationship between the plaintiff and the accident victim. Allowing recovery in such a case, through *Dillon*-type rules or guidelines, has the virtue of exposing and taking into account the interrelationship among physical, emotional, and relational harms, given that it is the physical harm to the direct accident victim which causes emotional distress to a witness, largely because of the witness's special relationship to the victim. It also makes the priorities of recovery among classes of persons explicit, much like legislative schemes for prioritizing recovery for wrongful death. However, this more full-bodied relational approach to negligence, most often associated with

43. See Goldberg & Zipursky, *supra* note 1, at 711.

feminist theories,⁴⁴ does not bear a strong resemblance to either Cardozo's or to Goldberg and Zipursky's analytical approach. And, I must admit, it finds little support in the current cases in which liability rarely depends on the existence of intimate or other noncontractual relationships.

In the end, I am not convinced that "duty in the primary sense" can be disentangled from other policy-based limitations on recovery—either in tort theory, the adjudication of cases, or in a *Restatement* of law. I like Goldberg and Zipursky's version because it does not ignore the significance of emotional harm cases, but the realist in me strongly suspects that the concept of duty will resist even this latest, sophisticated attempt to nail it down.

44. See e.g., Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 4 (1988); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 8 (1989); Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1 (1993).

